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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

MAXIMILIAN KLEIN, et al., on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

META PLATFORMS, INC.,

Defendant.

Case No. 3:20-cv-08570-JD

Hon. James Donato

**ADVERTISER PLAINTIFFS'  
OPPOSITION TO DEFENDANT META  
PLATFORMS, INC.'S MOTION TO  
EXCLUDE TESTIMONY OF JOSHUA  
GANS**

Hearing Date: December 14, 2023

Hearing Time: 10:00 a.m.

Courtroom 11, 19th Floor

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**FILED UNDER SEAL****PRELIMINARY STATEMENT**

Professor Joshua Gans is an expert economist who has offered opinions in support of Advertiser Plaintiffs' ("Advertisers") motion for class certification. His opening and reply reports provide extensive economic analysis of the data targeting barrier to entry ("DTBE") protecting Meta's social advertising monopoly, and of the effect of Meta's exclusionary conduct on the DTBE. Prof. Gans offers two central opinions in support of class certification: (1) if the facts and factual assertions offered by Advertisers on the merits of their case are proven at trial, it would follow as an economic matter that the DTBE was strengthened, resulting in the maintenance of Meta's monopoly and causing classwide injury and harm to competition; and (2) the effect on the DTBE, the harm to competition, and classwide injury can all be proven based on common evidence, which Prof. Gans surveys and describes in his reports. Meta has filed a *Daubert* motion to exclude only a portion of Prof. Gans's opening report—Section IV, the section applying his economic analysis to the asserted facts—and offers the Court two supposed bases to do so. Neither have any merit.

First, Meta faults Prof. Gans for echoing Advertisers' characterizations and descriptions of Meta's exclusionary conduct in his opening report. Meta contends that because Prof. Gans describes its conduct the same way Advertisers do, he must be offering lawyers' argument under the guise of expert testimony. Meta's argument is an exercise in obfuscation—and contrary to law. Prof. Gans assumed that Advertisers' factual contentions would be proven at trial, then analyzed the economic effects of those facts on the DTBE, on the relevant market, and on class members. Prof. Gans expressly stated as much—and that he was not opining on whether or not any of the factual contentions he analyzed are in fact true or already proved. Meta ignores this, probably because what Prof. Gans did—assume facts that will be proven at trial—is perfectly appropriate according to no less than the Supreme Court. *See Williams v. Illinois*, 567 U.S. 50, 57 (2012). Indeed, had Prof. Gans recited and adopted his own characterizations of the facts, he would have impermissibly intruded on the province of the factfinder—the very no-no that Meta incorrectly accuses in its motion. Meta's first argument for exclusion is meritless.

Meta's second argument for exclusion fares no better—and it is not only meritless, it is misleading. Meta argues that Section IV of Prof. Gans's opening report should be excluded because

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1 it supposedly lacks expert economic analysis. But this is an ostrich argument, which requires that the  
 2 reader (and the Court) pretend that Prof. Gans’s actual economic analysis—largely set forth in **Section**  
 3 **III** of his report—does not exist. Meta does not discuss (or even acknowledge) any of the analysis in  
 4 Prof. Gans’s Section III in its motion, but instead asks the Court to read only Section IV of his report  
 5 in isolation—and then exclude it for allegedly lacking what Prof. Gans already wrote, in the same  
 6 document, just in a portion Meta doesn’t want the Court to read.

7 Put simply, Meta’s Motion is factually manufactured and legally foreclosed. It presents no  
 8 viable grounds to exclude Prof. Gans’s testimony, and it should be denied.

**BACKGROUND<sup>1</sup>**

10 Joshua Gans is an economist and chaired professor at the University of Toronto, with  
 11 extensive research and publications on technological competition and innovation, licensing/tariff  
 12 negotiations, industrial organization, and regulatory economics. Prof. Gans submitted an opening  
 13 report on July 7, 2023, Ex. 1 (“Gans Rpt.”), and a reply report on September 1, 2023, Ex. 2 (“Gans  
 14 Reply”), in support of Advertisers’ Motion for Class Certification, Dkt. No. 643. In his report, Prof.  
 15 Gans offers two primary opinions: (a) if proven at trial, Advertisers’ factual contentions about Meta’s  
 16 conduct would support a finding of classwide injury and harm to competition; and (b) based on an  
 17 examination of some of the evidence, injury and harm to competition can be proven by common, non-  
 18 individualized, evidence at trial. Gans Rpt. ¶¶ 13-14.

19 ***Classwide injury and harm to competition.*** Prof. Gans examined Meta’s alleged conduct,  
 20 including Advertisers’ supporting evidence, and determined that if proven at trial, such conduct would  
 21 have a classwide impact on competition in the Social Advertising Market by strengthening the DTBE,  
 22 and would result in classwide injury as a result of Meta’s monopoly and the lack of a competitive  
 23 price check in the market. Gans Rpt. ¶¶ 13-14, 49-109. In Section IV of his report, Prof. Gans  
 24 considered five exclusionary acts and their effects on the DTBE protecting Meta’s monopoly: (a)

25 [REDACTED] (b) [REDACTED]  
 26 [REDACTED]

27  
 28 <sup>1</sup> All exhibits are attached to the Declaration of Yavar Bathaee (“Bathaee Decl.”).

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1 [REDACTED] (c) [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED] (d) [REDACTED]  
 4 [REDACTED]; and (e) [REDACTED]  
 5 [REDACTED]. *See id.* ¶¶ 55-109. Prof. Gans  
 6 reviewed each category of conduct and explained how such conduct, if proven at trial, would  
 7 strengthen the DTBE protecting Meta’s monopoly and prevent rivals from serving as competitive  
 8 price checks in the Social Advertising Market. *See id.* As part of this analysis, Prof. Gans provided  
 9 an extensive economic analysis of the DTBE, drawing on economic literature on barriers to entry in  
 10 advertising and technology markets, including his own published research and economic models. *See*  
 11 *id.* ¶¶ 15-48. Much of that analysis was set forth in Section III of his report, preceding his analysis of  
 12 the impact of the exclusionary acts if ultimately proven at trial. *See id.*

13 **Common evidence.** Prof. Gans examined the evidence and conduct alleged by Advertiser  
 14 Plaintiffs and concluded that classwide injury and impact could be proven from common evidence,  
 15 meaning evidence that does not vary as to each class member. *See id.* ¶¶ 49-51. In doing so, Prof.  
 16 Gans’s report recounted Plaintiffs’ factual assertions and their characterization of evidence supporting  
 17 those assertions. *See id.* ¶¶ 55-109. Prof. Gans was, however, clear that he undertook only to  
 18 determine whether the evidence and factual assertions to be proffered at trial could support proof of  
 19 anticompetitive harm and injury based on common evidence. *See id.* ¶¶ 9-10. Prof. Gans repeatedly  
 20 explained that his analysis of the evidence was not an opinion on the facts of the case. For example,  
 21 as to Meta’s [REDACTED] conduct, Prof. Gans stated: “I have been asked, in my analysis, to assume the  
 22 above-described conduct, in fact, occurred—I do not have an opinion at this time about whether it  
 23 did, in fact, or did not in fact, happen.” Gans Rpt. ¶ 75; *see also, e.g.,* ¶ 88 (as to [REDACTED]). Prof. Gans  
 24 was deposed on September 26, 2023. *See* Ex. 3 (“Gans Dep.”).

**LEGAL STANDARD**

26 Under Federal Rule of Evidence 702, an expert witness’s testimony is admissible if the  
 27 “testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell*  
 28 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). “Expert opinion testimony is relevant if the

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1 knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the  
2 knowledge underlying it has a reliable basis in the knowledge and experience of the relevant  
3 discipline.” *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (cleaned up).

**ARGUMENT****I. PROF. GANS APPROPRIATELY ASSUMED FACTS TO BE PROVEN AT TRIAL**

4  
5 Prof. Gans opined that Meta’s conduct, namely the five exclusionary acts described above,  
6 pp. 2-3, *supra*, if proven at trial, would strengthen the DTBE, allowing Meta to maintain its monopoly  
7 in the Social Advertising Market. As part of his opinion, Prof. Gans reviewed Plaintiffs’ factual  
8 contentions and evidentiary support to determine whether if proven at trial, they could, as matter of  
9 economics, show harm to competition and classwide injury through price inflation.  
10

11 Prof. Gans’s opinions on classwide injury and anticompetitive harm are based entirely on his  
12 economic analysis, not factfinding. Indeed, Prof. Gans’s reports are clear that he assumed the facts  
13 and evidence, as asserted and characterized by Advertisers, will be proven at trial. *See, e.g.*, Gans Rpt.  
14 ¶ 9 (“While I do not provide an independent analysis evaluating whether these conducts took place  
15 and the nature of the intent of the parties involved (that is, I take the conducts as described by the  
16 Plaintiffs as assumed facts), I do provide economic analysis of their likely consequences with regard  
17 to a Data Targeting Barrier to Entry specifically and competition in the social advertising market  
18 generally.”); ¶¶ 75, 88 (“I have been asked, in my analysis, to assume that the above-described  
19 conduct, in fact, occurred—I do not have an opinion at this time about whether it did, in fact, or did  
20 not in fact, happen.”); ¶¶ 60, 75, 94, 97, 100 (conclusions stand if certain facts are proven). He then  
21 provided an economic analysis of the resulting effects of that conduct, if proven, on the DTBE that  
22 protected Meta’s social advertising monopoly from competition. *Id.* ¶¶ 49-109. Prof. Gans examined  
23 evidence in support of Plaintiffs’ factual contentions to determine whether proof could be made based  
24 on common evidence (rather than individualized inquiry). *Id.* ¶¶ 55-109.

25 Yet Meta’s motion turns Prof. Gans’s actual analysis on its head. Meta faults Prof. Gans for  
26 supposedly “intrud[ing] on the role of the factfinder,” Mot. at 9, by adopting characterizations of the  
27 evidence that mirror those of Advertisers’ lawyers, arguing that by doing so, Prof. Gans is offering  
28 lawyer argument, not expert testimony. *See* Mot. at 10 (“Advertiser Plaintiffs have already argued

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1 these points, with exactly this framing, without Gans’s assistance in multiple discovery motions.”).

2 But this argument is spurious—indeed, upside-down. The Supreme Court has explained: “Under

3 settled evidence law, an expert may express an opinion that is based on facts that the expert assumes,

4 but does not know, to be true. It is then up to the party who calls the expert to introduce other evidence

5 establishing the facts assumed by the expert.” *Williams v. Illinois*, 567 U.S. 50, 57 (2012). **Of course**

6 Prof. Gans assumed the facts to be as Advertisers assert them for purposes of his economic analysis

7 of class certification issues—that is a “settled” expert function according to no less than the Supreme

8 Court, and is entirely appropriate at this stage, before any merits questions have been resolved. *See*

9 *Olean Wholesale Groc. Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 666–67 (9th Cir. 2022)

10 (en banc) (“In determining whether the ‘common question’ prerequisite is met, a district court is

11 limited to resolving whether the evidence establishes that a common question is capable of class-wide

12 resolution, not whether the evidence in fact establishes that plaintiffs would win at trial.”).

13 Indeed, a central question before the Court on class certification under Rule 23(b)(3) is “what

14 a class trial will look like,” including whether the trial will be overwhelmed by individualized

15 inquiries. *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 796 (Hurwitz, J. concurring) (quoting

16 *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 375 (5th Cir. 2016)). It is

17 impossible for Prof. Gans to determine whether classwide injury and harm to competition can be

18 proven with common evidence if he does not examine, and assume the proof of, some of the central

19 evidence and factual assertions that Plaintiffs will present at a trial on the merits.

20 Moreover, Prof. Gans’s own reports make expressly clear that he did **not** find facts or advance

21 lawyers’ arguments, as Meta incorrectly asserts. *See* Mot. at 10 (“He is simply putting an imprimatur

22 of expert testimony on the arguments Advertisers’ counsel seek to advance.”). To the contrary, Prof.

23 Gans assumed Advertisers’ factual contentions as to Meta’s exclusionary acts so that his opinion

24 would be limited to a discussion of economics—his undisputed area of expertise. His report is express

25 on this point. For example, in Section IV(A) of his report, Prof. Gans considered Meta’s [REDACTED]

26 [REDACTED] which Prof. Gans “underst[ood]” allowed Meta to [REDACTED]

27 [REDACTED]

28 [REDACTED]. Gans Rpt. ¶ 59. Prof.

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1 Gans’s description of the conduct hewed closely to Plaintiffs’ contentions and characterizations of  
 2 the evidence, and, importantly, Prof. Gans was clear that he was describing Plaintiffs’ factual  
 3 assertions, not adopting those assertions as part of his opinion:

4 *Plaintiffs assert* that Facebook used technology [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED].

7 *Id.* (emphasis added). Prof. Gans explained that his opinion was that if the [REDACTED] conduct was  
 8 “proven at trial,” it would be the sort of “common, classwide evidence” that could demonstrate  
 9 classwide economic impact on Facebook advertisers . . . .” *Id.* at 60; *see also id.* ¶ 75 (“I have been  
 10 asked, in my analysis, to assume that the above-described conduct, in fact, occurred—I do not have  
 11 an opinion at this time about whether it did, in fact, or did not in fact, happen.”).

12 Meta leaves out these express statements and instead pretends that Prof. Gans himself  
 13 characterized the evidence he examined and opined on those facts. For example, Meta takes issue  
 14 with Prof. Gans’s reference to “Facebook’s strategic purpose for [REDACTED]” and his  
 15 description of [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED] Mot. at 10-

18 11 (quoting (in part) Gans Rpt. ¶¶ 63-64). Meta argues that this supposedly shows that Prof. Gans  
 19 draws “conclusions” from “the evidence [that] are outside the scope of proper expert testimony,” Mot.  
 20 at 10, but Prof. Gans drew no conclusions about the truth or falsity of these documents. He concluded  
 21 only that “[t]hese documents provide common evidence regarding Facebook’s strategic purpose for  
 22 [REDACTED],” Gans Rpt. ¶ 64, not that these documents factually establish what Meta’s  
 23 strategic purposes were or were not, *id.* ¶ 75 (“I do not have an opinion at this time about whether it  
 24 did, in fact, or did not in fact, happen.”). At bottom, Meta’s argument that Prof. Gans improperly  
 25 invaded the province of the factfinder by making factual arguments is based on a demonstrably false  
 26 premise. When this premise is set aside, there remains no basis for excluding Prof. Gans’s testimony.  
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**FILED UNDER SEAL****II. PROF. GANS APPLIED EXTENSIVE ECONOMIC ANALYSIS TO ARRIVE AT HIS OPINIONS**

Meta's second argument to exclude Prof. Gans's testimony is not just incorrect, it is outright misleading. Meta argues that Prof. Gans, in Section IV of his report, simply concluded, with no economic analysis, that the evidence (if proven at trial) would establish classwide injury. To make this assertion, Meta ignores entirely Section III of that same report, which analyzes economic literature and sets forth the economic framework for his analysis of the anticompetitive effects of Meta's conduct. In sum, Prof. Gans's Section III sets out a detailed economic analysis, and Section IV applies it to Meta's alleged conduct. As Prof. Gans explained to Meta's lawyers at deposition:

Q: Have you read Meta's motion to exclude Section [IV] of your testimony?

A: I have read that. I've read that in full.

Q: Any reactions? . . .

A: My overall reaction is that you have trouble understanding what a full report is and the choices an expert might make in structuring that report, and that your confusion will be apparent to the Court.

Q: What do you understand that confusion to be?

A: Well, you—moving to exclude Part IV of the report on the basis that it contains no analysis, whereas Part III of the report was drawing out the analysis and creating the set of conditions that would allow me to look at the conduct and draw conclusions from them. So in effect, the report—it's not correct to say that there was no analysis in Part IV being given because that analysis was in Part III and was drawn upon in Part IV, and, in fact, that's what I outlined that I was going to do.

Gans Dep. 65:16-66:16.

Meta also argues that Prof. Gans's economic opinion is unreliable because it fails to consider [REDACTED] Mot. at 14-15. Prof.

Gans, however, is clear that he did in fact consider such [REDACTED] and [REDACTED]

[REDACTED] As Prof. Gans explained in his reply report, [REDACTED]

[REDACTED] Gans Reply ¶ 19. Contrary to Meta's argument that Prof. Gans has done nothing to "verify that claim," Prof. Gans made clear that his own published economic model "supports the analysis in [his] first report that [REDACTED]"

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1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED].” *Id.* ¶ 29; Gans Dep. 303:10-304:15. Meta pretends that Prof. Gans failed to provide  
4 economic support for his conclusion, but ignores that his own published economic model accounts  
5 for precisely Meta’s critique. *See* Gans Dep. 303:10-304:15 (“[REDACTED]  
6 [REDACTED]  
7 [REDACTED].”).

8 Finally, Meta makes the contradictory argument that Prof. Gans’s opinions are “obvious” and  
9 should be excluded on that ground. Mot. at 14 n.9. If Prof. Gans’s opinions are in such accord with  
10 economic principles and common sense that they appear obvious to Meta, that is grounds to deny  
11 Meta’s *Daubert* motion, not grant it.

**CONCLUSION**

12  
13 Meta’s Motion to Exclude the Testimony of Joshua Gans should be denied.  
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**FILER ATTESTATION**

I am the ECF user who is filing this document. Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that each of the other signatories have concurred in the filing of the document.

Dated: October 13, 2023

By: /s/ Brian J. Dunne